UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PAVLE ZIVKOVIC,

Plaintiff,

v. 22 Civ. 7344 (GHW)
Telephone Conference

VALBELLA AT THE PARK, LLC,

Defendant.

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New York, N.Y.
September 7, 2023
4:00 p.m.

Before:

HON. GREGORY H. WOODS,

District Judge

APPEARANCES

JOSEPH & KIRSCHENBAUM LLP
Attorneys for Plaintiff
BY: YOSEF NUSSBAUM
LUCAS C. BUZZARD

BAKER & HOSTETLER LLP
Attorneys for Defendant
BY: MICHAEL S. GORDON
MAXIMILLIAN S. SHIFRIN

(The Court and all parties appearing telephonically)

THE COURT: I'm going to begin by taking appearances from the parties. If there's more than one lawyer on the line for any party, I'd ask that party to have the principal spokesperson identify him or herself and the members of their team rather than having each lawyer identify themself individually.

Let me start, if I can, with the plaintiff. Who's on the line for plaintiff?

MR. NUSSBAUM: Good afternoon, your Honor. Yosef Nussbaum and Lucas Buzzard for the plaintiff.

THE COURT: Thank you.

And who's on the line for defendant?

MR. GORDON: Good afternoon, your Honor. This is Michael Gordon from Baker Hostetler. With me is Maximillian Shifrin on behalf of the defendant.

THE COURT: Good. Thank you.

So what I'd like to do is begin with some brief instructions about the rules that I'd like the parties to follow during this conference.

At the outset, please remember this is a public proceeding. Any member of the public or press is welcome to dial into this call, I am not monitoring whether they are, but I ask you to keep that possibility in mind.

Second, please state your name each time that you

speak.

Third, please keep your lines on mute at all times except when you are intentionally speaking to me or to the representative of a party.

Fourth, please abide by instructions from our court reporter that are designed to help the court reporter do his job.

Finally, I'm ordering that there be no recording or rebroadcast of all or any portion of today's conference.

So counsel, with all of that out of the way, let's turn to the substance of today's proceeding. This is a conference to discuss what appears to be a request to modify the discovery schedule in the case prompted by the withdrawal of Mr. Seeman as counsel for defendant here and the arrival of new counsel.

So, what I'd like to do is just to hear from each of the parties about your respective positions.

Before I do that, I just want to raise a brief threshold question. There are issues raised in your letters about Mr. Sipas. I believe that Mr. Sipas was also represented by Mr. Seeman. At least he represented the entity, if I recall correctly.

I just want to hear whether Mr. Seeman, to the parties' knowledge, is representing Mr. Sipas or any other person from whom discovery is being sought here. I ask insofar

as it may be relevant to the request for me to order the deposition of Mr. Sipas by a date certain.

Counsel for plaintiff.

MR. NUSSBAUM: Thank you, your Honor. Yosef Nussbaum for plaintiff.

Our understanding is that Mr. Seeman continues to represent Mr. Pent air and Mr. Sipas.

Mr. Seeman has just indicated to us yesterday that he's going to be substituted as counsel for 10Tier, but at the same time, he earlier informed us that Mr. Sipas is available to be deposed on September 19th, which would work for us.

THE COURT: Thank you, good. So I appreciate that.

Do I take from that, counsel, that --

MR. GORDON: Your Honor.

THE COURT: Yes.

MR. GORDON: Sorry. This is Michael Gordon for defendant.

My understanding about Mr. Sipas and 10Tier is substantially similar to Mr. Nussbaum for plaintiff. Although, I have been told that a new attorney is coming in. I've not spoken to that attorney. I don't know that Mr. Seeman could agree to a deposition date for someone else coming in, especially if they're just coming in. I think the new attorney's name is Harrington.

THE COURT: Thank you. I take no position on that.

The principal reason why I ask is to determine whether or not this is an issue for me to resolve here. Counsel for plaintiff, is the issue of the schedule for Mr. Sipas' deposition something that the Court needs to resolve here, is there an agreed upon date and subpoena for that agreed upon date already issued?

MR. NUSSBAUM: Yosef Nussbaum for plaintiffs.

We would ask for the Court resolve this by way of setting a firm deadline by which the deposition would have to take place as the Court has earlier done in July. Mr. Seeman did tell us a date Mr. Sipas was available, but that date hasn't been confirmed between us and 10Tier or Mr. Sipas. We believe the easiest way to do this is just to have a date by which the deposition must take place.

THE COURT: Thank you.

Mr. Seeman isn't present on the line here.

Mr. Seeman, are you on the line?

(Pause)

Since Mr. Seeman isn't on the line, I'm not likely to, without his feedback, set a specific date for the deposition of his client. Let's take this up in the frame of the remainder of discovery issues that we need to discuss here.

Let me hear first from counsel for plaintiff. What's your position regarding need for an extension of time? I'm particularly interested in your views regarding defendants'

position regarding the appropriate schedule for them to provide responses to outstanding discovery requests separate from the requests to extend their deadline to complete discovery for 120 days. What's your view regarding their proposal for the timeline for production of responsive materials?

MR. NUSSBAUM: Yosef Nussbaum for plaintiffs.

We believe defendant is clouding the issue here. In this case, the Court already ordered OGR — Oak Grove Road — to produce the specific documents. Defendants' proposal, as we read it, is they would now object to certain requests for documents that we propounded and then produced things at a later date. That would be going backwards here. There's a clear order in July or June 30th, I believe, from the Court specifying exactly what Oak Grove Road should be producing. There's no need to go backward.

So literally, with VATP, with Valbella at the Park, we served document demands. Valbella at the Park blew the deadline to produce those document demands and that's why we have to seek an extension of the discovery deadline. And then thereafter, in two letters to the Court, Valbella at the Park's counsel represented that they were going to substantively respond, produce the documents that we had sought in the document requests. Now the new counsel for Valbella at the Park, as we read their proposal, would be going backwards and asking that they first now serve objections and then later

serve responses. That's not what Seeman and Valbella at the Park represents to the Court in June and July in this case.

So, in terms of a proposal, we would ask the Court set a date certain. As we put it in our letter, VATP's responses were past due multiple times. We would ask the Court, whatever the Court deems reasonable, if it's a week or two weeks, that Valbella at the Park finally produce all the responsive documents to the request. And similarly with Oak Grove Road, the Court originally only gave Oak Grove Road I believe three weeks to respond, and at the time that Mr. Seeman (technical interruption) there were 11 days left in those three weeks. If Baker Hostetler needs three weeks to respond to those requests, that's fine, but we don't want to go backwards where they now think they can object to documents that the Court already ordered them to produce.

THE COURT: Thank you.

And just for my sake, were there objections filed to the requests previously, counsel for plaintiff?

MR. NUSSBAUM: There were no formal requests. The Court had an order to show cause hearing on June 30th, and at that hearing, the Court went through the specific requests with counsel for Oak Grove Road and addressed any objections that they had.

THE COURT: Good. Thank you.

Let me hear from counsel for defendant. Is counsel

for plaintiff construing your proposal properly?

MR. GORDON: This is Michael Gordon, counsel for defendant.

I believe there is a misconstrual here. This is not about responses or objections, this is about a timeline. What we had proposed, and I don't recall anywhere in our letter in any of our discussions with plaintiff's counsel talking about objections and responses, we're aware that this Court has issued a couple of orders with respect to discovery and we have every intention of abiding by those orders.

We also have just come into this case and are still trying to get our arms around OGR's documents. Just for purposes of clarity, Oak Grove Road I'll refer to as OGR and Valbella at the Park I'll refer to as VATP. We're getting our arms around both sets of document requests.

I would also point out that in the 2017 action, which is the related action before your Honor, in the interest of judicial and litigation efficiency, we agreed to respond to information subpoenas and document questions against VATP and OGR, both of whom are nonparties in that action.

Our proposal was merely to streamline discovery because both the discovery requests in this action and those that we agreed to accept in response to the 2017 action are overlapped significantly. And we felt or at least the agreement we tried to reach, that we do this on the same

timeline and a timeline that works for us, that we begin a rolling production of documents based upon the fact that, again, documents are still trickling in from our predecessor counsel, we're still getting documents from the client. So what we wanted to do was run discovery or coordinate discovery in both litigations in a way that would avoid duplication and bolster efficiency.

THE COURT: Good. Thank you. Understood. So I appreciate that.

The proposal then is that the rolling production will begin on the 15th and be completed by the 28th; is that right?

MR. GORDON: Well, plaintiffs would like the rolling production to be completed by the 28th. I mean, we could -- I think what the plan was, was for the rolling -- yeah, I guess we said we would endeavor to complete the rolling production by the 28th. I mean, given -- as things are mounting, I think a little more time than that would be helpful. I think every time a request for an extension is sought, there's a lot of push back from plaintiffs. We understand that. We know that they've been in the case since -- at least in the prior action since 2017. This action was commenced in 2022. So we understand their impatience. What they need to understand is that we are still getting our arms around a massive record and want to do right by our client.

Ideally, if we could respond to the document requests

and information subpoena questions in both actions by the 22nd and then commence a rolling production on the 28th, that would be great. And then the Court had requested that there be a status -- a joint status update on October 3rd, and I would recommend that that be followed. And then in that status update, we would be in a better position to advise the Court as to what remains to be produced.

And apologies, I just wanted to respond to something that I mentioned earlier --

THE COURT: I'm sorry. Just to be clear. In your letter, you refer to the agreement, which would be: "Will endeavor to complete their rolling production."

Now, counsel, I understand you to be proposing that you not endeavor to complete the rolling production by the 28th, but you will begin the rolling production on the 28th. Did I understand your remarks properly?

MR. GORDON: Honestly, because we are just beginning to address that, ideally, we would like to begin our rolling production prior to the 28th. My concern was -- I may have misspoken. Our intention -- we don't know that we will be able to finish our production by the 28th.

THE COURT: Thank you.

MR. NUSSBAUM: Your Honor, may I be heard --

MR. GORDON: Ideally, we would start the production before the 28th.

THE COURT: Thank you.

And by when do you anticipate that you will be able to complete the production?

MR. GORDON: Hopefully within the first couple of weeks in October.

THE COURT: Thank you. Good. Understood.

Yes, counsel for plaintiff, go ahead, I'll hear from you.

MR. NUSSBAUM: Thank you, your Honor. Yosef Nussbaum for plaintiff.

I think Mr. Gordon is confusing things here. The discovery that's due in this case, in the second case, I'll call it, the 2022 case, is the response to three -- I believe it was three or four document requests relating to email accounts that was due in May, and then that was represented to the Court it would be produced in June and July. The discovery that VATP owes us in the first case, in the 2017 case, is a completely different set of information. There's really no reason to tether the two to each other, especially considering that in this case, the 2022 case, there was a discovery deadline and we would like to finish discovery, versus in the earlier case, there is no discovery deadline, we're in post-judgment collection.

In this case, to be clear, there were really just email records that we were seeking, and other than that, we

didn't want anything else from Valbella at the Park and we were okay with discovery closing. And Oak Road is a little bit of a different story, but for Valbella at the Park, that's all that they owed us right now, so there's really no reason to tether the two to each other. Those documents were due in May, they represented would be produced in June and July. We really cannot understand why at this point they should be getting any more time than two weeks to produce them, even if they're new in the case, they should be where we were when we left things.

THE COURT: Good. Thank you.

Counsel for defendant, let me just ask you, if you'd like to comment on that. Counsel suggests that you're conflating the outstanding discovery in the two matters. Is your concern applicable to the limited discovery that plaintiffs assert that they are seeking in this case?

MR. GORDON: Yes. This is Michael Gordon for defendant.

Make no mistake, this case is basically part and parcel of defendants' judgment enforcement endeavor in the 2017 action. Their attempt to prove or to demonstrate that Valbella at the Park is the successor interest to Valbella Midtown, is part of their attempt to collect their judgment. And they're asking the same types of questions in furtherance of that undertaking.

Now, the limited discovery that remains of Valbella at

the Park -- or that is addressed to Valbella at the Park in this action pertains, to a certain extent, to the grand opening of the restaurant, who was invited, and it requires a term search on our clients' computers. We hope that that can be done expeditiously, but we're not certain. And at this moment, we don't know how long that will take.

I also want to point out that with respect to VATP, there was never any order that we were not allowed to object to certain discovery requests, it was only with respect to OGR, that OGR was directed to respond to a set of document requests and that the Court pruned at the June 30th conference.

THE COURT: Fine. Thank you.

So let's turn to the second issue. I'll hear first from counsel for defendant about the request by VATP for additional discovery. Why is that needed here given the nature of the claims at issue in this case?

MR. GORDON: Your Honor, when we were retained in this case and we examined -- suffice it to say, we did not expect to be taking this position, but when we looked at the record in this case, we were quite surprised that there wasn't any discovery taken by predecessor counsel of the core issue, i.e., whether Valbella at the Park is a successor in interest to Valbella Midtown.

As outlined in our letter, there were document requests seeking plaintiff's personal information, three

boilerplate interrogatories, and absolutely no discovery of successor liability. And we believe that if we were to head into summary judgment or trial on this record, Valbella at the Park would be materially prejudiced because they have not had an opportunity to take any discovery of plaintiff's position on these issues. Plaintiff has taken discovery on the issues, plaintiff has taken depositions, but plaintiff has focused on those issues that plaintiff believes will bolster successor liability claims or allegations. There are a myriad of other issues that have not been examined or considered that we feel must be considered in order for VATP to be able to defend itself in a meaningful fashion. And we endeavored to limit what we were seeking to requests for production, contention interrogatories, requests for admission, plaintiff's deposition and, most importantly expert discovery.

And I can address any and all of those if the Court wishes me to do so.

THE COURT: Thank you.

Yes, I will invite that.

First off, let me just ask about the underlying issue. Your predecessor chose not to take discovery on this topic, namely whether or not defendant is a successor. Why would you have me conclude that that was not a reasonable and reasoned approach, given that, arguably, information about whether or not your client is a successor is information within your

possession, custody, and control and not that of plaintiff?

MR. GORDON: Because plaintiff made allegations in its complaint, a number of which were inaccurate. Plaintiff worked at the alleged predecessor restaurant and has knowledge, unique knowledge of the operations of that restaurant. Plaintiff also has information that it has collected from other sources as to the bases for its successor liability claim.

So, I mean, the way that I -- again, you know, my predecessor chose to conduct discovery in a certain fashion. I cannot -- I can't reconcile what was done by my predecessor with VATP's need to defend itself in connection with these allegations, and I think that plaintiff does have information that we do not have.

Particularly, they have been taking -- they presumably did due diligence before they filed their complaint. Presumably, that due diligence was perhaps taken with the assistance of an investigator, I don't know, but we've seen sort of a piecemeal or hodgepodge collection of different areas of inquiry that appear to be directed toward bolstering their successor liability case and we feel that it would streamline summary judgment to be able to propound requests for production, contention interrogatories and requests for admission to ask plaintiffs to clarify these issues for summary judgment to narrow the issues in dispute. It's very possible that the parties agree on certain aspects of this dispute. So

I think it would be in the interests of litigation efficiency as well as fairness to do so.

And on the expert front, that, we believe, is critically necessary because at the center of the successor liability question are issues that only an expert can speak to, such as, you know, our expert would demonstrate that Valbella at the Park, the concept of that restaurant is different from Valbella Midtown in a myriad of ways.

I won't bore the Court with the details of that, but it has to do with items such as food and the menu, the ambiance, the service, the demographics, something called psychographics, which is a study in classification of people who come to eat at restaurants, the size of the restaurants, alternative income streams. The current Valbella at the Park has a private catering, Valbella Midtown did not have that. There are ample bases for distinguishing the two restaurants --

THE COURT: I'm sorry, counsel. Just out of curiosity, what, if any (indiscernible crosstalk) have anything to do with alterego or successor liabilities? Assume it was an Italian restaurant and then they take all of their operations, personnel, money, equipment and turn it into a Japanese restaurant? It seems to me that you're suggesting that the type of restaurant that it is has some impact on the assessment of whether or not it's the successor, as a matter of successor liability, what's the legal basis for that?

MR. GORDON: The legal basis for that is the *de facto* merger test and also the mere continuation test. Both tests focus on a number of factors. Continuity of ownership, whether all or substantially all of the assets are transferred to the successor corporation. But the core component of both tests is whether the new business is a continuation of the same business --

THE COURT: Thank you. Understood.

Counsel, let me just ask you to keep on reading those factors and I'll ask you to tell me how the type of restaurant it is affects those things. How does it affect whether the assets are the same?

MR. GORDON: It does not. The only component, and the most important component, the type of restaurant effect is what I'll call the continuation prong of both tests, which looks at physical location, operations, concept, you know, is this business the same business as the predecessor. And because we believe that the other component, which do not require an expert, fall in our favor. We feel that the scale will undoubtedly be tipped when we demonstrate that the new restaurant is a completely different entity in terms of continuity of management, personnel, physical location and, most importantly, operations. At the core of that, as I said, is the concept issue.

THE COURT: What kind of expert are you anticipating

retaining for purposes of opining on this concept question?

MR. GORDON: We've interviewed and we've narrowed down our choice to two experts, and both of these experts -- well, one that we picked has 30 to 40 years of expertise in the restaurant industry, teaches about these issues at culinary institutes, and has served as an expert in other litigations involving similar issues, perhaps not in the identical context whether one entity violated a non-compete by starting a similar restaurant, but looked at these myriad elements, particularly in the concept context to demonstrate that one restaurant was not a continuation of or based on the prior restaurant.

This is something that the fact finder needs to be framed by an expert because absent this type of analysis, the ordinary fact finder is not going to really be able to address the elements that go into concept. It is, from what we've seen, a science. I mean, I'll tell you, before I got involved in this case, I might not have thought that a restaurant concept was something that warranted expert discovery, but as I dived in this, I've seen that this is precisely the domain of an expert. If we had spoken to experts and they said, nah, this is not really appropriate for expert discovery, we would not have pursued it, but this is a very lively undertaking and there are experts out there who repeatedly have spoken to these issues in cases like this.

THE COURT: Thank you.

You referred to the kinds of factual issues that you'd like to pursue and any incremental fact discovery. To what extent does the discovery that you would like to take from plaintiff inform the expert evaluation of the issue that you're describing?

MR. GORDON: The discovery for plaintiff really focuses on the bases for plaintiff's successor liability theory. Typically, in a case like this or in any federal case, I would serve contention interrogatories and the requests for admission prior to summary judgment to understand, based on the record, what plaintiff's position is with respect to these issues. All we have now are depositions and letters and whatnot. There's no streamlined instrument that contains their theory, and that's because they've never been asked to provide such an explanation.

So, there may be facts -- further to that, there may be factual components to the expert analysis such as, you know, to the extent, kindly provide us a document to demonstrate that this restaurant is the same restaurant, that the menu is the same. I mean, they're basing this on information that they've collected and we've, you know, all that we've seen in the rather modest document production is we've seen a lot of social media material and a couple of copies of the menu and they're now focusing on the logo and the person who designed the website.

And the issue of successor liability goes significantly beyond those issues. I think -- I mean, that plaintiffs are following a roadmap, that they followed, their counsel followed in another case were issues of logo and advertising were of greater import. What's being ignored here and what deeply concerns us is that the concept issue, it had been completely disregarded and we would like the opportunity to develop the record on that and have an expert speak to this issue, which is a specialized issue, that only someone with expertise in restaurant management can speak to.

THE COURT: Good. Thank you.

So let meet turn to counsel for plaintiff.

How do you respond?

MR. NUSSBAUM: Thank you, your Honor. Yosef Nussbaum for plaintiff.

There's a lot to respond to that, I'll try to keep it short.

It's clear that counsel for defendant just wants to take this case backward. He mentioned a few times "concept" and as a detail concept, "menu." The record in this case is clear because defendant produced their current menu, we produced a menu from Valbella Midtown, and more than 80 percent of the items on the Valbella Midtown menu show up on the new restaurant's menu with a precise description. I know the Court doesn't want us to litigate the merits of the case right now,

but it's quite disingenuous at this point in the case, after 10 months of discovery, nearly 10 months of discovery, to say that, you know, we want to find information about the concept of the restaurant or whether it tracks the menu of the earlier location — that's just ignoring the record of what's happened here.

And they were, you know, they were free to do whatever they wanted when it came to discussing the concept of -- of the restaurant, you know, prior counsel. You know, it's clear logged, incoming lawyers take the case as they inherit it, and they don't get to do a do-over. Mr. Seeman didn't make a mistake here. He understood that all the facts lie with his client. Our client, who is admittedly out of the country, has not worked at the restaurant just really doesn't have much to say again. Counsel for Valbella at the Park is going backward, asking what the basis of the allegations in our complaint are — that, again, ignores almost 10 months of discovery, which have done a very good job -- where we have done a very good job of showing that this tremendous overlap in ownership, such as the name of the restaurant, the food at the restaurant, the employees.

We have, in discovery, subpoenaed the employee identities from the earlier restaurant and of the new restaurant, and there are significant crossovers. Almost the entire kitchen staff was transferred from the earlier

restaurant to the later restaurant. And again, that's information that wasn't in our control, that was always in Valbella at the Park and Mr. Seeman, prior counsel's control.

We would urge the Court to not let defendant take this case backward after almost a year, nearly 10 months of discovery, especially when all information was in their possession.

And the last thing, in the case management plan, again, they inherit the case as they come in. Mr. Seeman indicated that expert discovery was not applicable. I think in the five or ten-minute explanation of what the expert's going to do here, I think the Court is able to hear through it and understand that there really isn't an expert that could testify to the issues that we're talking about in this case under the alterego and mere continuation tests.

THE COURT: Thank you.

Let me hear from you, counsel for plaintiff, about --

MR. GORDON: Your Honor, may I respond to that, because I -- this is Michael Gordon for defendant.

THE COURT: Please hold your thought. I'm happy to give you the chance to respond, but let me just ask a couple of brief questions as followup. Please do hold your thoughts and I'm happy to let you respond.

First, counsel for plaintiff, can I ask you to remark on one part of counsel for defendant's comments. He said that,

in essence, he would be promulgating a contention interrogatories and requests for admission as a way to sharpen the case for presentation for motions for summary judgment. I understand your position is that they take the case as they've inherited it, but I'd like to ask you to comment on that remark. And I ask because granting them leave to conduct that kind of narrow written discovery might be an alternative that I could grant short of providing them with the full scope of the relief that they're requesting. I know that that's neither side's proposal now. I would just like to hear your position on that comment by counsel for defendant.

MR. NUSSBAUM: Yosef Nussbaum for plaintiffs.

Initially, it's difficult to respond without knowing specifically what they're asking for, especially because contention interrogatories aren't allowed under the local rules. And again, that would highlight how this will only take us further back and they would have to tell us what the interrogatories are, we would likely only object to them. And then, you know, the requests for contention interrogatories and requests to admit, as I mentioned earlier, just ignore the 9 or 10 months of discovery in this case. I don't know -- I haven't heard a specific issue from counsel for defendant that would be sharpened by a request to admit. There's a clear documentary record, there's a clear deposition record our client didn't work at the second restaurant. The record is where it is. To

ask our client what he knows about certain things, it's possible the answer will be that he doesn't know, but Valbella at the Park's 30(b)(6) witness told us the answer to that question. So it doesn't really follow that that -- that contention interrogatories and requests to admit are going to get us anywhere here.

THE COURT: Good. Thank you.

Let me turn back to counsel for defendants.

Counsel, please go ahead with your response.

MR. GORDON: Yeah, I wouldn't expect plaintiff to suggest that this discovery would be helpful and advance the case because plaintiff has merely advanced the case in the manner that it saw fit in terms of focusing on the elements that are most helpful to its case. The concept or continuation component of expert analysis, there are a myriad of differences between the two restaurants. For example, current restaurant is 18,000 feet, the prior restaurant was 5,000 feet. The current restaurant has concept rooms like a bourbon room and a wine room, which the prior restaurant didn't have. The prior restaurant was basically a lunchtime venue, the current restaurant is actually a destination restaurant. The demographics -- the type of people attracted by both restaurants are radically different. And we have data and we have information that perhaps predecessor counsel didn't think about, but that should -- I mean, part of the reason why

predecessor counsel withdrew from the case was due to a breakdown in communication with his client.

And so, yes, I understand that there's case law that provides that an incoming attorney takes the case as it is, but I would also call to the Court's attention that plaintiff's first case that they rely on, the Hyce v. Lemon case, which is a far less complicated case than this one. In that case, the court gave incoming counsel an additional six months of discovery because the predecessor counsel failed to take discovery on core issues in the case.

So, all we're really asking is an opportunity to be able to develop these issues, which I think will benefit -- more to the Court's benefit because it will allow us to streamline and identify issues for discovery. As plaintiff says, the menus overlap. Now, my understanding is completely different, that the menu is quite different. For example, Valbella at the Park has a sushi chef, which Valbella Midtown never had. There are a myriad of items on the menu that didn't exist at Valbella Midtown. And I don't mean to litigate the facts, but I'm aware -- we're aware of ample distinctions, and the fact that this wasn't in the record prejudices our client.

And I would also point out that plaintiff had gotten the opportunity to take multiple bites at the same apple. If plaintiff is taking redundant discovery in both cases of the same party and in a world according to plaintiff, their

position is, well, we can take as much duplicative, redundant discovery of Valbella at the Park and of OGR, but you guys are not specialized to take any discovery with respect to the core issue in the case. And again, we respect the fact that discovery -- that there was a discovery timetable. Respectfully, I think 10 months is very short in the lifespan of a Southern District case, and I don't think an additional few months is going to prejudice anyone. We realize plaintiffs want to get to the finish line very quickly for tactical reasons, but that would be inequitable for Valbella at the Park. And Valbella at the Park should at least have an opportunity to level the proverbial playing field rather than being forced into summary judgment without having an opportunity to put its best foot forward on these issues.

MR. NUSSBAUM: Your Honor, may I be heard for plaintiffs briefly?

THE COURT: Thank you. Please, go ahead.

MR. NUSSBAUM: Yosef Nussbaum for plaintiff.

Firstly, counsel's reference to the Hyce case is quite a shocking misrepresentation. It's cited in our letter that the case was decided on June 24th, 2021. And that court allowed for additional discovery, but only to August 9., which is roughly six weeks. I don't know where counsel is getting six months of fact discovery from.

Leaving that aside, back to the expert issue. The

issues counsel highlights are issues that they'll be able to put before the Court as facts on summary judgment and before a jury. If summary judgment doesn't go, one of the sides waives. These are not issues that we hire experts to help us out with to opine on. It's just very clear if they want to tell us about the concept, if they want to tell the Court or a jury how many seats there are that there's a sushi chef, like, we're not stopping them, but we just don't need an expert to help move that process along.

THE COURT: Very good. Thank you. Thank you very much.

MR. GORDON: Can I respond to plaintiff's, what I believe is a misstatement about the Hyce case?

THE COURT: Yes --

MR. GORDON: Yes, fact discovery was extended by 54 days, the remaining four and a half months or five and a half months was devoted to expert discovery. And I think that one of the problems here is that plaintiff is conflating fact and expert discovery. And even the Court's case management plan allows 120 days for fact discovery, and that additional 45 days for expert discovery after fact discovery had been completed.

So the Hyce case, since we're asking for both fact and expert discovery, the Hyce case reflects records where both were completed within a six-month period. And I also don't

believe plaintiff is in a position to speak to whether an expert is needed when plaintiff hasn't looked into this. Plaintiffs counsel, to the best of my understanding, hasn't looked into this issue. We have, and we would not be advancing the concept of an expert if we didn't think it was a good faith -- there was a good faith bona fide basis for an expert to speak to these issues and that the expert would assist the fact finder.

THE COURT: Thank you. Good.

So let me just resolve these issues.

First, with respect to the deadline for VATP and OGR to complete their productions, I understand that the request by the defendant is that written responses will be due on the 15th with a rolling production first endeavored to be completed by September 28th. Now the request is that it be completed by sometime in the first couple of weeks of October. I appreciate that. Plaintiff had suggested that September 22 is the date that the Court should set as the deadline for that information to be provided.

First, given the nature of the outstanding discovery requests in this case and given that they are long overdue, I think that some amount of time, additional amount of time is warranted in order to permit defendants to complete their production of those materials. I'm going to order that the production of the materials be completed no later than

October 6. Actually, I can make it October 9. October 9. The written responses will be due on the 15th, the rolling production should begin as promptly as practicable, but, in any event, must be completed no later than October 9.

With respect to the deposition of Mr. Sipas, I'm not going to take a position here. I will extend the deadline for completion of fact discovery solely to permit the completion of production of that discovery and also the deposition of Mr. Sipas, I expect that there will be a subpoena. And to the extent there's any noncompliance issue, it will be brought to my attention and at that time, I'll take up the issue.

Now, I'm not going to grant the requested extension of the discovery period requested by defendants here. The parties are well aware of the basic principles that govern my decision here. I'm not going to spend a lot of time restating the legal standard with which the parties are well familiar. I'll just note that the Court had established, pursuant to Rule 16, a clear set of deadlines for completion of discovery. The defendants were capably represented, they engaged in the creation of the scheduling order, which was entered by the Court and was later extended.

The rules say a number of things that are relevant.

First, the schedule may be modified only for good cause and with the Court's consent as stated in Rule 16 before. Significantly also, Federal Rule of Civil Procedure

26(b)(2)(C)(ii) states that the Court, in sum, must limit discovery, the scope of discovery where "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action."

First, I don't find good cause for modification of the type requested here for completion of discovery by defendant. The parties are familiar with the case law. Here, it's embodied in the decision by the Western District of New York in *Carlson v. Geneva City School Dist.*, 277 F.R.D. 90, 95 (W.D.N.Y. 2011) where the Court said: "A delay attributed to a change in counsel does not constitute good cause because new counsel is "bound by the actions of their predecessor.""

Again, from *Carlson* 277 F.R.D. 95, which in turn is quoting *Glover v. Jones*, 2006 WL 3207506 at *4 (W.D.N.Y. 2006). As the Court in *Carlson* said: "Nor does a mistake or oversight by counsel excuse the delay." Id.

Here, the reason for the requested extension of time is really prompted by fact that defendants have retained new counsel, that does not constitute good cause. In my view, I appreciate the arguments presented about the new light in which incoming counsel sees the case, but the parties understand the slippery slope issues that would come to bear were courts, and particularly in this case, to permit the recommencement of discovery whenever new incoming lawyer had a new or clever idea about how to present or conduct litigation in a case.

Here, I appreciate the arguments that are represented here, but I don't understand there to be an error on the part of Mr. Seeman or any other fundamental unfairness that needs to be rectified by modifying the schedule. So I think that the basic rule should apply and that the change of counsel should not be considered by the Court to constitute good cause.

Moreover, under Rule 26(b)(2)(C)(ii), I believe that I should limit the scope of discovery to that which I've already stated I will permit. That's because given the extended period of time for completion of discovery in this relatively straightforward case, I believe that the parties here, the defendants have had ample opportunity to obtain the information by discovery in the action. Again, the party, that is the defendants are bound by the actions of their predecessor, their agent. The party had ample opportunity to obtain information by discovery in the action. The fact that they did not take full benefit of the opportunity, as counsel for defendant now argues, does not change my assessment of the fact that they did have ample opportunity to do so. Their choice not to take advantage of that opportunity does not lead me to the conclusion that they did not have ample opportunity to obtain the information they did.

I note that in reaching this conclusion here that the basic issue in the case is of successor liability. As counsel for defendant articulated, most of the facts related to whether

or not an entity is a successor or of another is really information that is in the hands of the purported successor entity and perhaps its predecessor. Here, the requested discovery from plaintiffs I don't believe to be so significant in nature that there's a fundamental unfairness that I need to address upon modifying the schedule or deviating from what I'll describe as the basic rule under Rule 26(b)(2)(C)(ii), that I must limit the scope of discovery where parties had ample opportunity to obtain the information by discovery in the action. As both lawyers said, incoming counsel generally accepts the case as they find it. That is the case here.

So the request to open the discovery schedule in a plenary manner is denied. I do not find good cause to modify the existing case management schedule and order. To permit that modification under Rule 16, and not all cases in this district take years and years, large cases do, but this is not that kind of a case, this is a relatively discrete one. As a result, I believe they've had ample opportunity to obtain the information by discovery in the action and that I must therefore limit the discovery under Rule 26.

I will enter an order extending discovery for the limited purposes that I noted earlier, namely to permit defendants to respond to the outstanding discovery request within the timeframe that I've described and within which I expect plaintiff will conduct the deposition of Mr. Sipas.

Again, I am not ordering a particular date for that deposition to take place as Mr. Sipas is not represented here. To the extent that there's any issue of noncompliance with a subpoena regarding that deposition, the issue can be brought to the Court's attention in compliance with my individual rules of practice.

So I think that's it.

Anything else that we need to take up before we adjourn? Let me start with counsel for plaintiff.

MR. NUSSBAUM: Thank you. Nothing for plaintiff, your Honor.

THE COURT: Thank you.

Counsel for defendant.

MR. GORDON: Nothing further, your Honor.

THE COURT: Thank you, all, very much. This proceeding is adjourned.

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